IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE CIVIL JURISDICTION

WRIT PETITION NO.4136 OF 2005

Shri Subhash Ramkrishna Patil .. **Petitioner (Orig. Plaintiff)**

Versus

1. Kumar Housing Services & Consultancy
2. Shri Vimalkumar Kesarimal Jain
3. Shri Kewalkumar Kesarimal Jain
4. Shri Lalitkumar Kesarimal Jain
5. Pune Municipal Corporation
6. City Engineer,
   Pune Municipal Corporation
7. M/s. Kumar Housing and Land
   Development Ltd. .. **Respondents (Orig.Defendants)**

Shri Madhav Jamdar for the Petitioner
Shri Vishwajit Sawant i/b. Udwadia & Udeshi for Respondent Nos. 4 & 7.
Shri R.G. Ketkar for Respondent Nos. 5 and 6.

CORAM : S.R. SATHE,J.

DATED : 05TH FEBRUARY,2007

P.C. :-

1. Rule, returnable forthwith.

2. Petitioner the original Plaintiff in C.S. No. 849 of 2001 has filed this Writ Petition under Article-227 of the Constitution of India to challenge the order passed by the 5th Additional Small Cause Judge, Joint Civil Judge, Sr. Division, Pune whereby Plaintiff's application Exh-82 seeking amendment to the plaint was rejected.

3. For the sake of convenience hereafter the parties shall be referred to as '*Plaintiff*' and '*Defendants*'.

4. Plaintiff is the owner of the suit property bearing final plot No. 70/6 and 70/07 Yerawada, Pune. The defendant No.5 Pune Municipal Corporation acquired portion admeasuring 1422 sq.mts. i.e. 15,306 sq.fts. from the above mentioned property for Pune-Ahmednagar Road. As a result of the same, he was entitled to additional FSI for any building to be constructed on the remainder of the property. However, he opted for TDR in respect of the said property and entered into an agreement dated 11/08/1994 with M/s. Kumar Housing

Services and Consultancy, a partnership firm i.e. defendant No.1 for transfer of the said development rights in respect of the property described in para(1) of the plaint for consideration of Rs. 1,75,000/- and also executed a power of attorney on the same day in favour of defendant Nos. 2 to 4. According to Plaintiff, he lost confidence in respondent Nos. 2 to 4 and therefore, cancelled the power of attorney by issuing notice dated 10/02/2000 given for the area of 1422 sq.mts. He also informed accordingly to respondent Nos. 5 and 6 however, respondent Nos. 1 to 6 in collusion with each other carried out construction through defendant Nos. 2 to 4. The respondent No.1 further transferred development rights (TDR) to its assignee M/s. Kumar Housing and Land Development Limited i.e. defendant No.7. The assignee put up project known as 'Angan' on the suit premises by utilizing the TDR admeasuring 1422 sq.mts. The respondent Nos. 1 to 4 and 7 in fact transferred the TDR mentioned above to their property bearing CTS No.1304 and 1305. The defendant Nos. 1 to 4 and 7 sold different tenements out of the said project to

different persons.

5. The Plaintiff filed the above mentioned Special Civil Suit No.849 of 2001 for declaration that the agreement dated 11/08/1994 is cancelled so also the power of attorney executed in favour of defendant Nos. 2 to 4 and permanent injunction restraining the defendant Nos.1 to 4 and 7 from carrying out any construction by using the TDR of the suit property on CTS No.1304 and 1305, Yerwada Pune.

6. During the pendency of the suit, the Plaintiff came to know that the tenements in the building at CTS No.1304 and 1305 Yerwada have been constructed by utilizing the above mentioned TDR of the Plaintiff which is the subject matter of the suit. He, therefore, filed an application Exh-82 seeking amendment to implead the said persons to whom the tenements were allotted as party defendant Nos. 8 to 65 and also prayed that the defendant Nos. 8 to 65 shall not create any third party interest in respect of the said tenements in the building constructed on CTS No.1304

and 1305.

7. The defendant No.1 filed reply to the said application and opposed the same by denying that the power of attorney was revoked. According to him, the power of attorney executed by the Plaintiff is irrevocable and neither the agreement nor the power of attorney has been cancelled. He also contended that the defendant has no locus-standi to file the suit and amendment application as the agreement mentioned above is already acted upon. The defendant further contended that the proposed amendment would change the nature of the suit and unless Plaintiff shows his readiness and willingness to pay adequate Court fee on the changed valuation of the suit, amendment should not be allowed. Without prejudice to the above contention the defendant No.1 further contended that even according to Plaintiff, he had a right only in respect of 1422 sq.mts. So he can not claim amendment in respect of entire B-4 and B-7 building. Hence on all these grounds, the defendant prayed for the dismissal of the application. The defendant Nos. 4 and 7 adopted the say

filed by the defendant No.1.

8. After hearing both the learned advocates, the learned Trial Judge came to the conclusion that Plaintiff had in fact filed an application Exh-5 against the original defendant Nos. 1 and 7 to restrain them from carrying out any construction whatsoever by using TDR on the C.T. Survey No. 1304 and 1305 of Yerwada. He had also prayed that they should not create third party interest on the said property. However, the said application was dismissed for the want of prosecution. He, therefore, held that if Plaintiff was really interested in restraining defendants from transferring the TDR then there was no necessity to ask for impleading new purchaser. According to the learned Trial Judge the transaction entered into between defendant Nos. 8 to 65 was during the pendency of the suit and principle of lis pendence was applicable and so they were not necessary party. He,therefore, rejected the application.

9. Being aggrieved by the same, the Plaintiff has

filed the present Petition. In this Petition, before me Shri Madhav Jamdar, learned Advocate for the Plaintiff submitted that the learned Trial Judge has wrongly observed that defendant Nos. 8 to 65 are not necessary parties. In fact, when the subsequent transaction regarding the suit property has taken place during the pendency of the suit in order to avoid multiplicity of proceeding, it is necessary to bring on record the subsequent transaction and the persons who are concerned with the same. For this proposition, he has placed reliance on a case **Shikharchand Jain V/s. Digamber Jain Praband Karini Sabha AIR 1974 SUPREME COURT 1178** as well as on a case **Sampath Kumar V/s Ayyakannu and Another (2002) 7 Supreme Court Cases 559**. As against this, Shri Vishwajit Sawant, learned Advocate for Respondent Nos. 4 & 7 submitted that the application is filed at very late stage. Plaintiff did not pursue his application for temporary injunction and as such it was dismissed. As a result of the same, the defendants even transferred the tenement. So, the present application is not bonafide. Besides this, the

proposed amendment is in respect of a time barred claim. The learned advocate placed reliance on a case **Rasiklal Manikchand Dhariwal and Ors. V/s. Kishor Washwani and Anr. Appeal No.158 of 2005 in Chamber Summons No.1 of 2005 decided on 3rd May, 2005** by this Court wherein it is observed that if the application is not bonafide the same can not be allowed.

10. Prima facie, it appears that Plaintiff had agreed to sell the TDR granted in his favour and accordingly executed an agreement as well as power of attorney in favour of defendant Nos. 2 to 4. It is the case of Plaintiff that the said agreement as well as power of attorney was subsequently cancelled by him. At this stage, we are not concerned whether the said agreement and power of attorney was actually validly cancelled or not. It is an admitted fact that the TDR which was initially granted to Plaintiff i.e.1422 sq.mts. was subsequently assigned and ultimately, it was used by defendant Nos. 4 and 7 for carrying out construction on the property bearing CTS No.1304 and

1305 Yerwada. Merely because Plaintiff's application for temporary injunction Exh-5 was rejected for want of prosecution we can not jump to the conclusion that present application is not bonafide. Considering this aspect, it is very clear that the authority relied upon by the learned advocate for the defendants is of no help to the defendants.

11. It is needless to say that if at all Plaintiff succeeds in the suit then there would be further complications regarding implementation of the order because admittedly, during the pendency of the present suit subsequent event has taken place namely the building which is constructed by using the suit TDR has been transferred to defendant Nos. 8 to 65. Naturally, when such is the position, it is always desirable that all those persons who are likely to be affected by any decision in the suit can be allowed to be impleaded. From this angle, it can be said that the defendant Nos.8 to 65 are certainly proper parties. The view taken by the learned Trial Judge in this behalf is certainly not legal and correct.

12. As observed in **AIR 1974 SUPREME COURT 1178** it is open to the Court to take notice of events which have happened after the institution of the suit and afford relief to the parties in the changed circumstance. Where it is shown that the relief claimed originally as by reason of subsequent change in circumstances requires modification then amendment to bring that event on record and consequential relief in that behalf has to allowed. It is also well settled that the very object of order-6, rule-17 of Civil Procedure Code is to avoid multiplicity of proceedings. If we take into consideration the facts and circumstances of the present suit, it is very clear that if defendant Nos. 8 to 65 who are in fact presently in possession of the suit building which is constructed after utilizing suit TDR No.1422 sq.mts. are not joined as parties then there would be further complications and multiplicity of proceedings. So, in order to avoid the same the proposed amendment ought to have been allowed by the learned trial Judge.

...11/-

13. So far as the objection with regard to limitation is concerned it is well settled that the Court has every power to specifically direct that the amendment shall not relate back and for the purposes of limitation in respect of amended relief, the date of filing of the application would be relevant. From the perusal of the proposed amendment it is clear that Plaintiff is in fact not trying to make out any new or inconsistent case. He has not at all changed his stand. As a result of subsequent event which occurred during the pendency of the suit, he has filed the present application for amendment. In my considered view, the proposed amendment will in fact enable the Court to decide the matter justly and correctly and would put an end to the controversy and would not give rise to any multiplicity of proceedings.

14. It is true that the Plaintiff's right is only in respect of TDR of 1422 sq.mts. The tenements of defendant Nos. 8 to 65 are covering much more portion than the same but then as it is Plaintiff can not say that the said TDR 1422 sq.mts. has been used for any

specific tenements. We do not know whether the defendant Nos. 1 to 4 and 7 are in a position to say specifically as said 1422 sq.mts. has been used for particular tenements. So, under such circumstances, no fault can be found with the proposed amendment and the same certainly can not be rejected on that ground.

15. In view of above I think that the order passed by the learned trial Judge rejecting the application for amendment was not legal and correct. The same shall have to be set aside.

The Writ Petition is allowed.

The order rejecting the application Exh-82 is set aside and the said Application Exh-82 is allowed. Plaintiff is directed to carry out the amendment in the plaint as prayed in Exh-82 within 15 days from today and take necessary steps to serve added defendants immediately. The point of Limitation with regard to amended relief is kept open. The trial Court to give opportunity to the original defendants as well as to the added defendants to file their Written Statements to amended plaint.

...13/-

Rule is made absolute in above terms.

(S.R. SATHE,J.)

At this stage, the learned advocate for the respondent Nos. 4 and 7 submitted that the operation of the above mentioned order be stayed for four weeks. Looking to the facts and circumstances of the case and the fact that the suit was already stayed for a period of about 1 year, as the result of the interim order passed in this Petition, I do not think that there is any necessity to grant time as prayed and to further protract the matter. Hence, prayer to stay the above order is rejected.

(S.R. SATHE,J.)